JAN 8 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1597

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,
Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION OF ASSOCIATED INDUSTRIES, INC., CAPITAL ASSOCIATED INDUSTRIES, INC., CENTRAL PIEDMONT INDUSTRIES, INC., PIEDMONT ASSOCIATED INDUSTRIES, INC., and WESTERN CAROLINA INDUSTRIES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

BRIEF OF ASSOCIATED INDUSTRIES, INC., CAPITAL ASSOCIATED INDUSTRIES, INC., CENTRAL PIEDMONT INDUSTRIES, INC., PIEDMONT ASSOCIATED INDUSTRIES, INC., and WESTERN CAROLINA INDUSTRIES, INC., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

JAMES M. MILES
JAMES B. SPEARS, JR.
HAYNSWORTH, BALDWIN AND MILES
Post Office Box 10005
Federal Station
Greenville, South Carolina 29603
Counsel for Amici Curiae

January 3, 1974

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1597

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,
Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION OF ASSOCIATED INDUSTRIES, INC., CAPITAL ASSOCIATED INDUSTRIES, INC., CENTRAL PIEDMONT INDUSTRIES, INC., PIEDMONT ASSOCIATED INDUSTRIES, INC., and WESTERN CAROLINA INDUSTRIES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The following organizations are herein referred to as the "Associations":

Associated Industries, Inc.
Gastonia, North Carolina

Capital Associated Industries, Inc.
Raleigh, North Carolina

Central Piedmont Industries, Inc.
Charlotte, North Carolina

Piedmont Associated Industries, Inc.
Greensboro, North Carolina

Western Carolina Industries, Inc
Asheville, North Carolina

The Associations hereby respectfully move the Court for leave to file a brief as *amici curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. While the consent of Counsel for Respondents has been obtained, Counsel for Petitioners herein refused to consent to the filing of a brief by the Associations as *amici curiae*.

INTEREST OF THE ASSOCIATIONS

Each organization is an employer's association whose members are located in North Carolina. The number of employers who are members of each association and the number of employees employed by the members of each association are as follows:

Associated Industries, Inc., Gastonia, North Carolina
150 employers in North Carolina
60,000 employees (approximate)

Capital Associated Industries, Inc., Raleigh, North Carolina
375 employers in North Carolina
88,000 employees (approximate)

Central Piedmont Industries, Inc., Charlotte, North Carolina
231 employers in North Carolina
40,000 employees (approximate)

Piedmont Associated Industries, Inc., Greensboro, North Carolina
200 employers in North Carolina
150,000 employees (approximate)

Western Carolina Industries, Inc., Asheville, North Carolina
300 employers in North Carolina
100,000 employees (approximate)

The question presented in the instant case is a matter of continuing importance to the Associations.[1] Briefly stated, that question is whether individuals who are "supervisors" within the provisions of the National Labor Relations Act, as amended, are protected from discharge by their employers for involvement in union activities under a state's right-to-work laws, notwithstanding a federal labor policy which withholds such protection.

This matter is of significant national concern and of material import to the Associations' members. All of the Associations' members are subject to the national labor laws as well as the North Carolina Right-To-Work laws, and are directly affected by the substantial and far reaching consequences that the decision here may have on labor relations, not only in North Carolina, but also in the nineteen other states which have similar right-to-work provisions. Additionally, the brief of the Respondents herein argues that if the North Carolina Right-To-Work laws are not preempted by federal law, then, in the alternative, the Court must establish a federal substantive rule to resolve the conflict herein based on the common law of labor relations as recognized by prior decisions of the Court. The Associations have no reason to believe that the argument on this point will be expanded and be made complete in this Court. If this argument is approved by the Court the decision of the Supreme Court of the State of North Carolina must be affirmed. For these reasons, the Associations request this opportunity to present their views on the instant case to the Court.

---

1. The Associations submitted a brief *amici curiae* to the North Carolina Supreme Court in its consideration of the case from which the present appeal is taken, *Beasley* v. *Food Fair of North Carolina, Inc.*, 282 N.C. 530, 193 S.E. 2d 911 (1973).

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying *amici curiae* brief in the present case in support of the position of the Respondents.

Respectfully submitted,

JAMES M. MILES
JAMES B. SPEARS, JR.
HAYNSWORTH, BALDWIN AND MILES
Post Office Box 10005
Federal Station
Greenville, South Carolina 29603
Counsel for Associated Industries, Inc., Capital Associated Industries, Inc., Central Piedmont Industries, Inc., Piedmont Associated Industries, Inc., Western Carolina Industries, Inc.

January 4, 1974

INDEX

INTEREST OF THE AMICI CURIAE 5

ARGUMENT 6

I. North Carolina's Right-To-Work Law Imposes Sanctions upon an Employer Who Terminates a a Supervisor Because of Activity in or on Behalf of a Union Organizational Drive. Congress Preempted This Area of Labor Relations Law 6

II. Substantive Principles of Federal Labor Relations Law Reserving to An Employer Unfettered Control Over Union Activities of His Supervisors Are Paramount to Conflicting Doctrines of State Law Which Deprive Employers of Such Control 7

A. Federal Common Law of Labor Relations Must be Fashioned from Our National Labor Policies: The *Lincoln Mills* and *Lucas Flour* Decisions 7

B. "Legislative Purpose" of Section 14(a) of the National Labor Relations Act Was to Insure That an Employer Could Command the Loyalty of His Supervisors 9

C. North Carolina's Right-To-Work Law Cannot Be Construed So As to Frustrate the Established Federal Policy of Section 14(a) .. 16

CONCLUSION 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

CASES:

Burk-Waggoner Oil Association v. *Hopkins*, 269 U.S. 110 ..... 19, 20
Burnet v. *Harmel*, 287 U.S. 103 20
DeSylva v. *Ballentine*, 351 U.S. 570 21
Dewey Brothers, Inc., 187 NLRB No. 17, 76 LRRM 1074, *enf'd*, 80 LRRM 2112 (4th Cir. 1972) 13
Electro Motive Mfg. Co. v. *NLRB*, 389 F.2d 61 (4th Cir. 1968) 13
H. J. Heinz Co. v. *NLRB*, 311 U.S. 514 6
Hill v. *Florida ex rel. Watson*, 325 U.S. 538 25
Local 81, Amalgamated Meat Cutters and Butcher Workmen v. *NLRB*, 458 F.2d 794 (D.C. Cir. 1972) 14-15
Local 1625, Retail Clerks v. *Schermerhorn*, 375 U.S. 96 16
Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 ....8, 25
NLRB v. *Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966) 13
NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 ..... 17, 18
NLRB v. *Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir. 1951), *cert. den.*, 342 U.S. 908 (1952) 13
NLRB v. *Lowe dba Thermo-rite Mfg. Co.*, 406 F.2d 1033 (6th Cir. 1969) 13
NLRB v. *Toledo Locals Nos. 15-P and 272, Lithographers and Photo-Engravers International Union*, 437 F.2d 55 (6th Cir. 1971) 15
Packard Motor Car Co. v. *NLRB*, 330 U.S. 485 ..... 9, 23, 24
Rutherford Food Corp. v. *McComb*, 331 U.S. 722 19
San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB No. 252, 69 LRRM 1157 (1968) 15

Texas Co. v. *NLRB*, 198 F.2d 540 (9th Cir. 1952) 15
Textile Workers Union of America v. *Lincoln Mills*, 353 U.S. 448 ..... 7, 8, 25
UAW v. *Wisconsin Employment Relations Board*, 351 U.S. 266 23
United Construction Workers v. *Laburnum Construction Co.*, 347 U.S. 656 23
Wissner v. *Wissner*, 338 U.S. 655 21
Youngdahl v. *Rainfair, Inc.*, 355 U.S. 131 23

STATUTES AND CONGRESSIONAL REPORTS:

National Labor Relations Act, as amended:
1947 Taft-Hartley Amendments 9, 12, 15, 17, 21
Section 2(3) 14
Section 2(11) 14
Section 8(a)(2) 6
Section 8(b)(1)(B) 14
Section 14(a) 8, 9, 13, 14, 18, 19, 20, 23, 25
Section 14(b) 6, 16, 18

(As Codified)

29 U.S.C. Section 152(3) 14, 17, 22
29 U.S.C. Section 152(11) 9, 14
29 U.S.C. Section 158(a)(2) 6
29 U.S.C. Section 158(b)(1)(B) 14
29 U.S.C. Section 164(a) 8, 22
29 U.S.C. Section 164(b) 6, 16
North Carolina General Statutes (as codified) Section 95-78 ..... 14, 20
House Report No. 245, 80th Congress, 1st Session ..10, 11, 12
Senate Report No. 105, 80th Congress, 1st Session 12

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1597

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,
Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF OF ASSOCIATED INDUSTRIES, INC., CAPITAL ASSOCIATED INDUSTRIES, INC., CENTRAL PIEDMONT INDUSTRIES, INC., PIEDMONT ASSOCIATED INDUSTRIES, INC., and WESTERN CAROLINA INDUSTRIES, INC., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

This *amici curiae* brief is filed by Associated Industries, Inc., Capital Associated Industries, Inc., Central Piedmont Industries, Inc., Piedmont Associated Industries, Inc., and Western Carolina Industries, Inc., ("Associations"), contingent upon the Court's granting the foregoing motion to file a brief as *amici curiae*.

INTEREST OF THE AMICI CURIAE

The interest of the Associations is set out on pp. 2-3, of the foregoing motion for leave to file a brief as *amici curiae*.

ARGUMENT

I.

North Carolina's Right-To-Work Law Imposes Sanctions upon an Employer Who Terminates a Supervisor Because of Activity in or on Behalf of a Union Organizational Drive. Congress Preempted This Area of Labor Relations Law.

The *Amici Curiae* have knowledge of and concur in Respondents' treatment of the preemption argument. Consequently, we feel that the preemption doctrine as developed by the Court in prior decisions and as presented in Respondents' brief on the merits is clearly dispositive of the issues presently before the Court.

Further, the *Amici Curiae* wish to point out for the Court that Petitioners' contention that there exists a state remedy for their discharge because of their activity on behalf of a union organizational drive which is not preempted by federal law, poses for an employer an impossible choice. If a state remedy is recognized herein, then an employer would, in effect, be forced to choose between terminating a supervisor thereby subjecting the employer to a multiplicity of state remedies, or retaining a supervisor who participates in union activity of rank and file employees, thus subjecting the employer to a violation of Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. § 158(a)(2)) for employer interference with the self-organizational rights of its employees. *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514. Congress certainly could not have comprehended such an impossible conflict for an employer by the enactment of Section 14(b) of the National Labor Relations Act (29 U.S.C. § 164(b)).

II.

Substantive Principles of Federal Labor Relations Law Reserving to an Employer Unfettered Control Over Union Activities of His Supervisors Are Paramount to Conflicting Doctrines of State Law Which Deprive Employers of Such Control.

A. Federal Common Law of Labor Relations Must Be Fashioned from Our National Labor Policies: The Lincoln Mills and Lucas Flour Decisions.

The Court, in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448, recognized a federal common law of labor relations. This federal common law exists to judicially supplement statutory enactments with substantive rules so as to resolve situations where particular interpretations of state laws conflict with established federal policies, as in the instant case. *Lincoln Mills* involved enforcement of a collective bargaining contract under Section 301(a) of the Labor Management Relations Act.[1] Alabama's common law rule against enforcement of executory agreements to arbitrate labor contract provisions was contrary to a federal labor policy of enforcing such agreements. The Court resolved the conflict and concluded that "the substantive law to apply . . . is federal law, which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456. The Court, further explicating the source of the federal law, continued:

> The Labor Management Relations Act expressly furnishes some substantive law. . . . Other problems will lie in the penumbra of express statutory mandates.

1. 61 Stat. 156, 29 U.S.C. § 185. All citations to the U.S. Code are to the 1964 edition, unless otherwise indicated.

> Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. 353 U.S. at 457.

Subsequently, in a suit involving similar contract terms, the Court in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, determined that "comprehensiveness" inheres in the *Lincoln Mills* mandate to formulate federal substantive rules to complement existing statutory provisions. Therefore, in suits involving conflicts between state and federal law, ". . . incompatible doctrines of local law must give way to principles of federal labor law." 369 U.S. at 102.

Section 14(a) of the Act, as amended,[2] provides:

> Sec. 14.(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining. 29 U.S.C. § 164(a).

Like Section 301, 14(a) expresses a federal policy. The federal policy established by Section 14(a) is that an employer is free to deal with his supervisors' union activities as he deems appropriate. This right to insist on the undivided loyalty of supervisors cannot be infringed upon by national or local laws.

---

2. The National Labor Relations Act, as amended, is hereinafter cited as the "Act."

B. "Legislative Purpose" of Section 14(a) of the National Labor Relations Act Was to Insure That an Employer Could Command the Loyalty of His Supervisors.

The legislative history of Section 14(a) leaves little doubt as to "Congressional intent" to withhold both federal and state protection from those defined as "supervisors" under the Act (29 U.S.C. § 152(11)). An affirmative right in employers to freely control supervisors' union activities is legislated by Section 14(a).

The facts in this appeal present to the Court the same grave concerns which led Congress to enact the Taft-Hartley amendments[3] to the Act in 1947 as it pertains to "supervisors." Prior to 1947, the National Labor Relations Board's[4] policy was to exclude supervisory personnel from collective bargaining units which included employees subject to the supervision of those same supervisors. The basic reason for such a policy is that supervisors stand in a unique relationship with their subordinates in that the supervisor can easily coerce or intimidate his employees on the subject of unions. At the same time, however, the Board and Courts held that "supervisors" did enjoy some protection under the Act because Congress had not elected to exclude them from the definition of "employee." *See*, *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485.

Because of the immense potential for abuse of such an interpretation, Congress, in amending the Act in 1947, specifically excluded "supervisors" from all the protection afforded "employees." The legislative history surrounding

---

3. Act of June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151, *amending*, 29 U.S.C. § 164 (1946).

4. The National Labor Relations Board is hereinafter cited as the "Board."

these 1947 amendments to the Act indicates clearly that Congress intended to restrict supervisory personnel from participating in the union activities of rank-and-file employees. In House Report No. 245, 80th Congress, 1st Session, beginning at page 14, the following remarks[5] are representative of the Congressional feeling on the question of excluding foremen and other supervisory personnel from the definition of "employee."

> The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, ... H. Rep. No. 245, 80th Cong., 1st Sess., p. 14.
>
> *Management, like labor, must have faithful agents.* If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then . . . there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for

---

5. The *Amici Curiae* respectfully refer the Court to Respondents' brief on the merits for a more detailed exposition of the amendments' legislative history. We present herein only portions thereof particularly significant to Argument II.

it, and to carry on the whole of labor relations. *Id.* at 16.

* * *

The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. . . . What the bill does is to say what the law always has said . . . : That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for any reason, he does not trust.

If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.* *Id.* at 15 (emphasis in original).

The intent of this legislative history is clear: Supervisors are expected to be loyal to management when a question of management loyalty versus union loyalty arises. Moreover, this same legislative history demonstrates clearly that Congress intended to establish a national policy concerning supervisors. The following comment, also from House Report No. 245, makes this Congressional intent even more concrete:

As under the present Act, the power of the Board under the amended Act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision . . . to give to the States a concurrent jurisdiction in respect of closed-shop and other union

> security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. *It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. Moreover, the bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen.* H. Rep. No. 245, 80th Cong., 1st Sess., p. 40 (emphasis added).

The same theme is seen in the Senate Report on the 1947 Taft-Hartley amendments. In speaking of the major changes resulting from the amendments to the Act, the Senate Report No. 105, 80th Congress, 1st Session, outlines the effect of the number one change:

> 1. It eliminates the genuine supervisor from the coverage of the Act as an employee and makes it clear that he should be deemed a part of management. S. Rep. No. 105, 80th Cong., 1st Sess., p. 3.
>
> * * *
>
> In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national Act free from any compulsion by this National Board or *any local agency* to accord to the front line of management the anomalous status of employees. *Id.* at 5 (emphasis added).

The facts of the instant case must be viewed with this Senate Report language in mind. Food Fair is subject to

the National Labor Relations Act; the Petitioners were supervisors within the meaning of the Act; these supervisors were engaged in organizational activity of the rank-and-file employees; and, it is contrary to a substantial national policy for a Federal or State agency to compel Respondents to treat these supervisors as employees when they engage in organizational activity. Yet, that is precisely what Petitioners would require of Respondents, directly in contravention of the above quoted language.

In certain situations, an employer clearly violates federal law by discharging a supervisor. When a supervisor refuses to engage in *unlawful* activity on behalf of an employer during a union campaign, the employer violates the Act by firing him. *See, e.g., Dewey Brothers, Inc.*, 187 NLRB No. 17, 76 LRRM 1074, *enf'd*, 80 LRRM 2112 (4th Cir. 1972); *NLRB* v. *Lowe dba Thermorite Mfg. Co.*, 406 F.2d 1033 (6th Cir. 1969). A supervisor is protected from adverse actions by his employer where he voluntarily gives a statement to a Board agent during the investigation and preparation of an unfair labor practice case. *Electro Motive Mfg. Co.* v. *NLRB*, 389 F.2d 61 (4th Cir. 1968). On the other hand, it is axiomatic that the discharge or demotion of a supervisor merely because of his union activities is not a violation of the Act. *See, e.g., NLRB* v. *Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir. 1951), *cert. den.*, 342 U.S. 908 (1952); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966). It, therefore, is clear that in this area of supervisors, Congress has prohibited certain actions by an employer against a supervisor, whereas in other areas an employer is protected. Specifically, in Section 14(a), Congress unequivocally stated that no law—either national *or local*—could compel an employer to deem individuals [or for that

matter, "persons," as the North Carolina Right-To-Work Law[6] is written] who are "supervisors" to be "employees."

Congress granted supervisors the right to become union members in Section 14(a). However, Section 14(a) does not detract from the undivided loyalty supervisors owe to their employer under Section 8(b)(1)(B)[7] of the Act as well as Section 2(3)[8] which excludes "supervisors" from the statutory definition of "employee" and Section 2(11)[9] which defines the extent of a supervisor's authority.

Section 8(b)(1)(B) of the Act prohibits union coercion or restraint of supervisory personnel for supervisory or managerial acts performed by them. *Local 81, Amalgamated Meat Cutters and Butcher Workmen* v. *NLRB*, 458

---

6. N. C. GEN. STAT. § 95-78. Declaration of public policy.—The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of *persons* to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (emphasis added) *See also*, N. C. GEN. STAT. §§ 95-79 through 95-83 for similar provisions using the term "persons."

7. 29 U.S.C. § 158(b)(1)(B) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . . .

8. 29 U.S.C. § 152(3) provides, *inter alia*:

(3) The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . .

9. 29 U.S.C. § 152(11) provides:

(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

F.2d 794 (D.C. Cir. 1972). This section of the Act was passed because Congress felt that a supervisor's absolute duties, responsibilities and obligations in the performance of managerial and supervisory acts to his employer could not be detracted from by his membership in a union. The Ninth Circuit Court of Appeals has held that it is clear from the history of the 1947 Taft-Hartley amendments to the Act that Congress intended to restore to the employers the right and power to insist upon the undivided loyalty of their supervisory personnel. *Texas Co.* v. *NLRB*, 198 F.2d 540 (9th Cir. 1952). *See also, NLRB* v. *Toledo Locals Nos. 15-P and 272, Lithographers and Photo-Engravers International Union*, 437 F.2d 55 (6th Cir. 1971), where the Court concluded that supervisory personnel must not be restrained in any way from performing duties which the employer required them to perform.

The legislative history noted above, and the cases cited herein, point out the dilemma which faced Congress in 1947, *i.e.*, whether to protect supervisors who engage in union activity, or whether to grant to employers the unfettered right to insist on their loyalty. Congress concluded that supervisors should not be protected because to do so would lead to an employer either having to replace its supervisors who become aligned with its rank-and-file employees, or to face *de facto* nonrepresentation by its supervisors. *See, San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252, 69 LRRM 1157 (1968).

C. North Carolina's Right-To-Work Law Cannot Be Construed So As to Frustrate the Established Federal Policy of Section 14(a).

North Carolina's Right-To-Work statute became state law prior to the effective date of the Taft-Hartley amendments to the Act. Section 14(b) of the Act enables states to enact laws prohibiting union-management contracts that require as a condition of employment present or future membership in a labor union or the payment of union dues. Section 14(b) provides:

> (b) Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. 29 U.S.C. § 164(b).

Such an express grant of jurisdiction and authority by Congress is not a license for a state to thereby override other national policies which may be more paramount to the smooth functioning of a nationwide labor policy. The Court in *Local 1625, Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, recognized limitations on the extent of a state right-to-work law. *Schermerhorn* reaffirmed earlier cases which held that where the object of picketing was to *obtain* a union security clause, the picketing cannot be enjoined as a violation of a state right-to-work law. "[S]tate power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b).*" 375 U.S. at 105 (emphasis by the Court). The Court through its own statutory construction thus delineated one parameter of right-to-work laws. The Court should delineate here a rule that will correct Petitioners' overbroad interpretation of the right-to-work laws

of North Carolina. The Court would thereby protect an equally important national policy of ensuring to an employer control over his supervisors' union activities.

There are many Supreme Court decisions which have rejected various impositions of state laws, generally involving legitimate state interests, on a federal statutory policy. The Court in selecting the source of the governing law has historically considered three general factors: *first,* and most importantly, federal policy as reflected in statutory phraseology and in legislative history; *second,* the particular interest of the state in the activity regulated by federal law; *third,* protection of the participants in the regulated activity—labor and management in the instant case—from competing systems of primary law.

For example, before the enactments of both the North Carolina Right-To-Work Law and the Taft-Hartley amendments in 1947, the Court in 1944 encountered a factual situation very similar to the present case in *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111. The publishing company refused to bargain collectively with a union representing newsboys contending that it was not required to bargain because the newsboys were not "employees" within the purview of the National Labor Relations Act.[10] The company asserted that the newsboys were "independent contractors" according to California's common law standards which it contended should determine the applicability of the federal statute's protective provisions. The Court recognized a need for uniformity in this area of labor relations and thus concluded that to allow a state to determine which citizens within its borders qualify for protection under a federal statute:

---

10. Act of July 5, 1935, c. 372, § 2, 49 Stat. 450, *as amended,* 29 U.S.C. § 152(3) (1964).

> . . . would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions make in applying the distinction for wholly different purposes. Persons who might be "employees" in one state would be "independent contractors" in another. They would be within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders. 322 U.S. at 123. (emphasis added).

The Court's reasoning in the *Hearst* decision clearly applies to the present appeal. Analogously, if one right-to-work state, *e.g.*, Virginia, interprets its state law to *exclude* supervisors from its statutory term "persons" in conformity with the national labor policy one can easily imagine the very real conflicts which could result affecting the great mass of commerce between the two states, North Carolina and Virginia, if Petitioners' interpretation of North Carolina's statute is allowed. Two supervisors with the same company at different plants, one located in each state, would have substantially different employment rights with the same employer. Certainly Congress did not intend such an inequitable patchwork plan from its enactment of Sections 14(a) and 14(b). The broad solution which Congress intended by excluding "supervisors"

from the Act is clearly frustrated if large numbers of supervisors are protected in one state and not in another.

Rutherford Food Corp. v. *McComb*, 331 U.S. 722, involved the same definitional problem as the *Hearst* decision; *i.e.*, whether a particular worker (meat boner) was an "employee" within the terms of the Fair Labor Standards Act[11] or an "independent contractor." The Act requires that certain records be kept by employers concerning wages and overtime[12] if the workers are included within the Act's definition of "employee." The Court again rejected the Petitioner's proposed solution of allowing the common law of the various states to restrict the statutory provisions which defined "employee." The Court appropriately observed that "putting on a(n) . . . label . . ." (331 U.S. at 729) according to a state's common law standards does not alter the protection and operation of the Fair Labor Standards Act because to do so would limit the Act's scope contrary to Congress' intent. Similarly, the label "persons" in North Carolina's Right-To-Work Law cannot be construed to alter the operation of Section 14(a) of the National Labor Relations Act which extends protection to employers in exercising unrestricted control over their supervisors' union activities.

In yet another important area of federal law, the Court has demonstrated that local conceptions of legal relationships between an unincorporated association, its shareholders and outsiders for other purposes cannot be allowed to limit the operation of the federal taxing authority. *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U.S. 110, involved the imposition of the corporate tax rate by the federal government on earnings of an organization which

---

11. 52 Stat. 1060, 29 U.S.C. § 203(e).

12. 29 U.S.C. § 207.

constituted a partnership under Texas law. Under the state law the partnership was not a legal entity; consequently, the partners were liable for its debts and it could not hold property in its own name. The association contended that the tax invaded the state's power to regulate the ownership of property within its borders. The Court recognized the importance of freeing a federal scheme of taxation from the vagaries of the various states' laws and held:

> It is true that Congress cannot convert into a corporation an organization which by the law of its state is deemed to be a partnership. But nothing . . . precludes Congress from taxing as a corporation an association which although unincorporated, transacts its business as if it were incorporated . . . . Neither the conception of unincorporated associations prevailing under the local law, nor the relations under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed. 269 U.S. at 114.

Similarly, Respondent agrees that Petitioners' concept of "persons" under N.C.G.S. 95-78 *et seq.* for many state purposes may legitimately include those individuals whom the Act defines as "supervisors." However, to allow such a concept to hamstring a federal scheme of labor relations which clearly comprehends an employer's right to discharge a supervisor for his own, as well as rank-and-file, union activities, completely ignores the importance which Congress attached to Section 14(a) of the Act. *See also, Burnet* v. *Harmel,* 287 U.S. 103 at 110, where the property status of an oil lease under state law was rejected for federal tax purposes.

In 1949, California sought to apply its community property rule that a wife has one-half interest in her husband's life insurance if the premiums come out of community property (his earnings). The state law, as applied, was in derogation of a federal statutory policy that soldiers have an absolute right to select beneficiaries of their federal life insurance policies. The Court, in *Wissner* v. *Wissner,* 338 U.S. 655, held that the California rule would directly have undercut Congressional intent with respect to the federal government's nationwide insurance program. The Court, of course, did not invalidate California's community property law but held that on this particular conflict with federal law, the otherwise valid state law must give way to federal policy. Likewise, North Carolina's Right-To-Work laws, as construed by Petitioners, would undermine the management-labor bargaining balance struck by Congress in the national labor laws by protecting supervisors who "swap sides" in clear contravention of legislative intent of the 1947 Taft-Hartley amendments. It is significant that Petitioners have not demonstrated a single *compelling* state interest which North Carolina may have in construing the statutes as Petitioners urge. In the absence of such an interest, federal policy must have deference.

DeSylva v. *Ballentine,* 351 U.S. 570, involved a federal statute, The Copyright Act of 1947,[13] which extended renewal rights of a deceased author to his "widow, widower, or children."[14] The case involved an author who, having secured original copyrights on numerous musical compositions, died before the time for renewal arose. He was survived by his widow and one illegitimate child. The

13. 61 Stat. 652, 17 U.S.C. § 1, *et seq.*

14. 17 U.S.C. § 24.

questions before the Court were whether an illegitimate child was included within the term "children" and which body of law, state or federal, would resolve the issue. The Court decided that the general scheme of the federal statute contemplated reliance on state law for definition of not only the term "children" but also the author's other legal relations, *e.g.*, widow, widower, next of kin and executor. Consequently, the Court decided that the term "children" in the federal statute would be controlled by state law.

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. (citations omitted). This is especially true where a statute deals with a familial relationship; *there is no federal law of domestic relations, which is primarily a matter of state concern.* 351 U.S. at 580 (emphasis added).

Significantly, the determinative factors the Court relied upon in *DeSylva* are absent in the present appeal. *First*, in contrast to the absence of a federal law of domestic relations as in *DeSylva*, there does exist a substantial body of federal labor relations law, both statutory and common law, from which the Court can formulate a governing rule for the instant appeal. The national labor laws, given substance and vitality by decisions of the Court, clearly distinguish between a "supervisor" and "employee."[15] The states in exercising their constitutional and congressionally ceded legislative powers, must respect that distinction which Congress has deemed so important. *Second*, in considerable contrast to domestic relations being primarily of state concern, both the legal relation-

---

15. 29 U.S.C. § 152(3), (11); 29 U.S.C. § 164(a).

ships and economic responsibilities of supervisory personnel are so inextricably intertwined with interstate commerce, that the parameters of the present appeal extend beyond North Carolina's borders to sister jurisdictions which may or may not have comparable and compatible right-to-work laws. Consequently, at the very least, the "supervisory" aspect of labor law is "primarily" of national concern. States clearly retain control in such areas as public health and safety or protection of person or property. *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266; *United Construction Workers* v. *Laburnum Construction Co.*, 347 U.S. 656. In the absence of these primary state concerns, however, diverse state policies should not shape the content of federal law by exception or definition. Therefore, the federal policy embodied in Section 14(a) cannot be abridged by a state law, within its own territory, in the absence of a very compelling state interest.

For the Court to allow Petitoners' interpretation of North Carolina's Right-To-Work Law to supersede, at least in practical importance, the federal policy of Section 14(a) would have significant and unsettling ramifications not only in North Carolina but also in nineteen other states which presently have such laws or constitutional amendments, as well as the remaining jurisdictions without such laws. First of all, Petitioners' interpretation would create the type of situation that existed in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, which the Taft-Hartley amendments' passage was intended to correct. Mr. Justice Douglas, in dissenting in *Packard*, noted that even a "union of vice-presidents" would be entitled to protection under the then existing interpretation of the Act. 330 U.S. at 494. If Petitioners' interpretation of the North Carolina Right-To-Work Law is approved in the present appeal, the

only practical difference from the *Packard* result would be that state law, rather than federal law, would be the foundation for "such a basic change in industrial philosophy." 330 U.S. at 495. To accomplish by indirection what has been specifically forbidden to be accomplished by direction is a process repugnant to American jurisprudence.

More importantly, this matter of supervisors' involvement in union activities of the rank-and-file employees is peculiarly one that calls for uniform law. The possible consequences of supervisors' union membership having different meanings under state and federal law would inevitably exert a disruptive influence upon both the promulgation and administration of industrial relations policies upon employers engaged in interstate commerce. Because none of the parties—the supervisors, employer, employees or union—could be certain of the rights, responsibilities and obligations possessed by each, the process of labor relations would be made immeasurably more difficult by the necessity of trying to formulate policies in such a way as to contain the same meaning under as many as 50 state laws and federal substantive laws, all of which might one day be invoked in enforcing collective bargaining contracts. If Petitioners' interpretation is approved, and if a collective bargaining agreement is signed by an interstate commerce employer with operations in states other than North Carolina, the possibility of conflicting substantive interpretations pertaining to supervisors under competing laws will very likely lead to prolonged labor disputes. As the Court has said in another area of labor law where conflicts existed between state and federal law:

> Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 at 104.

In closing, a quote by Mr. Justice Frankfurter, speaking in dissent about federal-state accommodation in a labor setting, is appropriate:

> We are in the domain of government and practical affairs, and this Court has not stifled State action, unless what the State has required, in the light of what Congress has ordered, would *truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden. Hill* v. *Florida ex. rel. Watson*, 325 U.S. 538, 552 (1945) (emphasis added).

We submit that Petitioners' interpretation of North Carolina's Right-To-Work Law would "entail contradictory duties" for supervisors and employers alike and "make actual, not argumentative, inroads on what Congress has commanded. . ." in Section 14(a). Therefore, we urge the Court to formulate a rule according to the common law of labor relations as it did in the *Lincoln Mills* and *Lucas Flour* decisions to substantiate the unequivocal Congressional purpose of guaranteeing to employers complete control over their supervisors' union activities and thereby resolve the present federal-state statutory conflict.

CONCLUSION

For the reasons stated herein, as well as those arguments and authorities raised by Respondents, it is urged that the Court affirm the decision of the Supreme Court of the State of North Carolina.

Respectfully submitted,

JAMES M. MILES
JAMES B. SPEARS, JR.
HAYNSWORTH, BALDWIN AND MILES
Counsel for Amici Curiae

Post Office Box 10005
Federal Station
Greenville, South Carolina 29603

January 4, 1974

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing Amici Curiae Brief on all parties required to be served by enclosing a true copy of same in a postpaid, properly addressed envelope, which was deposited in the United States Mail as follows:

Mr. Robert C. Moss
McCaul, Grigsby and Pearsall
1005 United Virginia Bank Building
Richmond, Virginia 23219

Messrs. R. M. Stockton, Jr. and James H. Kelly, Jr.
Hudson, Petree, Stockton, Stockton & Robinson
610 Reynolds Building
Winston-Salem, North Carolina 27101

Mr. Larry L. Eubanks
Attorney for Petitioners
417 NCNB Building
Winston-Salem, North Carolina 27101

This 3rd day of January, 1974.

JAMES M. MILES